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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 542

ANNA M. FOUNTAIN, *Petitioner,*

v.

PAUL FILSON AND ANNA F. FILSON.

PETITIONER'S REPLY BRIEF

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Certiorari should be granted even if the arguments in the brief in opposition are correct.

Respondents' brief in opposition is addressed to only one of the two reasons petitioner advanced to support a grant of certiorari. The decision below was correct, they say, and therefore the writ should be denied.

They make no attempt to controvert petitioner's contention that the case nonetheless involves an important question of federal procedure which has not been, but should be, settled by this Court. Under the Court's Rule 38, that factor warrants a grant of certiorari regardless of whether or not the decision below was right.

The arguments in the brief in opposition are not correct.

In addition, however, respondents' arguments in defense of the decision below do not withstand analysis. In essence they are based on this syllogism: Civil Rule 54(c) authorized and indeed required the District Court to render summary judgment in favor of respondents; the court did not do so; *ergo* the Court of Appeals properly included in its mandate directions to enter such a judgment without further proceedings.[1]

That this reasoning is in some crucial respect fallacious becomes readily apparent when a similar syllogism is tested against the *Cone*[2] and *Globe Liquor*[3] cases. In those cases the argument would run this way: Rule 54(c) required the District Court to render judgment n.o.v. in favor of the respondents; the court did not do so; *ergo* the Court of Appeals properly directed entry of judgment for them. In each case, however, this Court unanimously held that the Court of Appeals had no power to issue such a direction.

More detailed examination of respondents' position shows that their major premise and their conclusion are both highly questionable.

(a) *The District Court could not have rendered summary judgment for respondents without further proceedings.*

As indicated in the petition for certiorari, every relevant part of Rule 56 opposes the argument that even a

[1] Respondents also rely on Rule 56(d). That Rule, however, merely provides for narrowing the triable factual issues where the whole case is not disposed of on a motion for summary judgment; it has no bearing on the questions raised by the petition for certiorari.

[2] *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212 (1947).

[3] *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948).

district court may without further proceedings enter summary judgment in favor of a party who has not moved for it in accordance with that Rule.[4] In framing their major premise respondents apparently assume that Rule 54(c), "Demand for judgment", tacitly and indirectly works a modification of Rule 56—and presumably of many other Rules, including Rule 50(b).

This assumption is based on a misapprehension of the scope and function of Rule 54(c). That Rule deals only with the *content* of a judgment. It comes into play after a district court, pursuant to the procedure established by other Rules (including Rule 56), has determined that the facts and the applicable substantive law entitle one party to a particular kind of relief; after that determination has been made, and then only, the Rule directs the court to grant the appropriate relief even though it was not explicitly requested in the pleadings.[5] But Rule 54(c) has nothing to do with the procedure whereby the court is to make the preliminary determination of what the appropriate relief is. It has nothing to do with when, *i.e.*, at what stage of a case, judgment should be entered. And in particular it has

[4] Subdivisions (a) and (b) permit both parties to move for summary judgment and set the earliest times each may file his motion. Subdivision (c) prescribes the latest time—10 days before the date fixed for the hearing; expressly gives the one who is resisting summary judgment at least nine days in which to file opposing affidavits; and then authorizes entry of judgment forthwith if the state of the facts permits it and if "*the moving party* is entitled to a judgment as a matter of law" (italics added).

[5] The Advisory Committee had this to say of the second sentence of the Rule, which is the relevant part for present purposes:

> "... It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.)."

nothing to do with whether judgment may be entered against a party who not only has had no trial but has not even had an opportunity to show a dispute over the material facts.[6]

(b) *Assuming that the District Court could have rendered summary judgment for respondents under certain circumstances, the Court of Appeals could not direct entry of such a judgment.*

It may be that it is within a district court's power to provide certain supplementary procedures which would pave the way for the entry of summary judgment in favor of a party who did not make a timely motion under Rule 56. The present case will serve as an illustration. Suppose the District Court had taken the same view of the case as the Court of Appeals did—*i.e.*, that facts over which there was no substantial dispute pointed to an acknowledged indebtedness due re-

[6] Respondents rely on a speculative statement appearing in 3 Moore's Federal Practice, p. 3183 (1938) and on three district court decisions, two of which relied in turn on Professor Moore's statement.

In the same statement Professor Moore recognized that the point was not open and shut. In support of his generalization he cited a provision of the New York Civil Procedure Act which expressly puts litigants on notice that summary judgment may be entered for a party who has made no cross-motion therefor. To us the existence of that rule in New York, together with the absence of a similar provision in the later federal Rule, tends to indicate an intent not to adopt this particular of the New York practice. It may be relevant to note also that Professor Moore's statement was made before the *Cone* and *Globe Liquor* decisions and that he had not anticipated enunciation of the proposition for which they stand. See 3 Moore's Federal Practice pp. 130-2 (Supp. 1948).

The cases listed by respondents do not seem to us to reflect the best practice, but in any event are readily distinguishable in that the party against whom judgment was rendered had in each case tacitly agreed that there were no material facts in dispute; in none of the cases did the losing party object to the entry of judgment on the ground that his adversary had not filed a cross-motion.

spondents from petitioner. To make sure that petitioner's rights were not infringed, the court could easily have suspended proceedings long enough to allow respondents to perfect a motion for summary judgment and petitioner to attempt a showing that there was a genuine dispute over facts material to the new legal theory.[7] With a delay of but a couple weeks the court could then have made the determination contemplated by Rule 56(c) or (d), confident that both sides had been accorded their full day in court. Short of thus suspending the proceedings, the court could at least have asked petitioner if she considered any material facts to be in dispute and if so what they were and what kind of evidence she had to show the dispute.[8] If her position seemed sound, the court then could have withheld its decision until the evidence was proffered and examined.

Assuming for purposes of argument that one or the other of these procedures would be permissible under Rule 56, it does not follow that a Court of Appeals has power to direct entry of summary judgment in a case in which the district court has used neither alternative. In the present case, of course, the appellate court apparently made no effort to determine for itself the relevance or substantiality of the evidence petitioner of-

[7] For a recent case in which this procedure was followed, see *Pinkus* v. *Reilly*, 71 F. Supp. 993 (D. N. J. 1947).

[8] In the three cases upon which respondents rely, the district courts apparently considered that this minimum procedure was necessary but would suffice. In each case, as respondents' quotations show, the district court took pains to consider *sua sponte* whether the non-movant asserted any real dispute over material facts, and there is no indication that the losing parties requested the opportunity to present further affidavits. As indicated in note 6, *supra*, petitioner doubts if such procedure adequately complies with Rule 56, but she is willing to assume arguendo that it does.

fered to produce. Thus it did not accord petitioner even the minimum safeguards which a district court would have been required to provide. But, and probably more important, proceedings of the type now being considered are peculiarly adapted to trial court use. Wise judicial administration calls for interpretation of Rule 56, like Rule 50(b), to preclude their application at the appellate level.

Still another consideration, present in this case but not in the *Cone* and *Globe Liquor* cases, suggests a construction of the Rules which would not permit the result arrived at below. In those cases the appellate court knew that a remand without directions would necessarily have resulted in the considerable delay, expense and inconvenience consequent upon a complete new trial; in this case a simple remand would have produced no such effect if respondents were indeed entitled to summary judgment. On remand respondents presumably could have moved the District Court for summary judgment 10 days before the new hearing. If petitioner had not then succeeded in showing a dispute over material facts, respondents would have received their judgment without further delay. If, on the other hand, she had succeeded in showing such a dispute, trial would have been held and a miscarriage of justice averted.

Conclusion

Certiorari should be granted and the Court of Appeals ordered to remand the case for further proceedings.

Respectfully submitted,

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